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No. 96-1203

In the Supreme Court of the United States

OCTOBER TERM, 1996

CAROLYN WEAVER, PETITIONER

v.

UNITED STATES INFORMATION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Employees of the State Department, the United States Information Agency, and the Agency for International Development are required under a provision of the Foreign Affairs Manual (FAM) to allow their employing agency to review proposed speaking, writing, and teaching materials on matters of "official concern"—i.e., materials which "may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency, or to current [United States] foreign policies, or which reasonably may be expected to affect the foreign relations of the United States." 3 FAM Subch. 4100, App. A, § 628.2(a). The question presented in this case is whether Section 628.2 is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 87 F.3d 1429. The opinion of the district court (Pet. App. 61a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1996. A petition for rehearing was denied on October 31, 1996. The petition for a writ of certiorari was filed on January 29, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employees of the State Department, the United States Information Agency (USIA), and the Agency for International Development (AID) are required to submit all speaking, writing and teaching material on matters of "official concern" to their employing agency for review prior to publication. 3 United States Department of State Foreign Affairs Manual (FAM) Subch. 4100, App. A, § 628.2 (Nov. 8, 1995). Section 628.2 provides in relevant part:

> a. * * * All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States are of official concern and shall be submitted * * * for clearance by the employee's agency, whether the employee is acting officially or privately.
>
> b. No employee shall publish any material of official concern under paragraph a until it has been cleared. The purpose of this clearance requirement is to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning the employee's agency's responsibilities or what conclusions should be drawn from such information * * *
>
> c. Clearance will not be granted until all classified material and all material of official

> concern under paragraph a which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted from the proposed speaking, writing, or teaching material.

When the employee proposes to publish in his or her private capacity, the FAM also makes the "employee responsible for having published with [the material] a specific statement to the effect that the opinions and views expressed are the employee's own and not necessarily those of the employee's agency." 3 FAM § 628.5-3.

2. Petitioner Carolyn Weaver, a part-time writer for the Voice of America (VOA), a unit of USIA, published an article in a journal in 1988 without submitting the article to her employer for prepublication review under FAM Section 628.2. The article was entitled, "When the Voice Of America ignores its charter—An insider reports on a pattern of abuses." The article discussed a number of issues concededly of official concern, including a criticism of VOA's alleged broadcasting of coded signals to Solidarity activists by playing a song from a Rod Stewart album. An agency official read petitioner an oral admonishment for her failure to comply with the prepublication review requirement. Pet. App. 2a-3a.

Before receiving the oral admonishment, petitioner filed suit in district court to challenge the review procedure contained in Section 628.2 as unconstitutional under the First Amendment. Petitioner later amended her complaint to contest the admonishment. Pet. App. 3a.

The district court granted USIA's motion for summary judgment. Pet. App. 61a-65a. Applying the balancing test developed in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), for assessing the validity of restrictions on public employees' speech, the court concluded that "[t]he regulation as written is constitutional on its face." Pet. App. 65a. The court reasoned that "the regulation does not purport to authorize the agency to prohibit publication altogether, to censor it, or even to impose any discipline upon an author who publishes over its objection." *Ibid.* The court also found that if an employee "proposes to publish written material respecting her employer, or on the subject of her government work, it is certainly not unreasonable to require that she herself furnish it with a copy of her writing, even in advance of publication, if what is being said will possibly have repercussions harmful to the employer or its mission." *Id.* at 64a.

3. A divided panel of the court of appeals affirmed, holding that Section 628.2's prepublication review requirement comports with the First Amendment. Pet. App. 1a-60a.[1] The court of appeals observed that Section 628.2 was "not entirely clear" (*id.* at 11a) whether the rule "authorize[d] punishment for publication of material disapproved under the criteria" of Section 628.2(c). *Id.* at 12a. The court observed that, if it did, "the regulation would raise serious constitutional issues," because "it is doubtful that the agency

[1] Because the court of appeals concluded that petitioner had failed to exhaust her administrative remedies under the Civil Service Reform Act of 1978, the court of appeals also upheld the district court's dismissal of the counts of the complaint that related specifically to petitioner's oral admonishment. Pet. App. 4a-10a. That issue is not before this Court.

could, consistent with [*Pickering*], penalize publications devoid of non-public information, by employees with non-sensitive responsibilities * * * simply because the publication took a view 'inconsistent with current foreign policy.'" *Id.* at 12a-13a (quoting 3 FAM 628.2(c)).

The government argued, however, that Section 628.2 should not be interpreted to "authorize any form of punishment for publication of material disapproved by the agency, so long as it was submitted for review beforehand." Pet. App. 12a. The court adopted the "procedural interpretation" advanced by the government. *Id.* at 16a. The court explained that its interpretation was guided by "the constitutional difficulties entailed by reading § 628.2 more broadly than suggested by the government," and its reluctance "to find burdens on speech that the government eschews any intention to impose." *Id.* at 19a.

The court of appeals then applied a balancing test that weighed "the government interest in 'promoting the efficiency of the public services it performs through its employees'" against "the interest of prospective speakers and their audiences in free dissemination of the speakers' views." Pet. App. 20a (quoting *United States* v. *National Treasury Employees Union (NTEU)*, 513 U.S. 454, 465-468 (1995)). Applying that test, the court found that Section 628.2 "clearly passes muster." Pet App. 23a.

The court emphasized that "[n]o speech is forbidden" under Section 628.2. Pet. App. 23a. The court also rejected petitioner's argument that "the government, though lacking the authority to prohibit publication of unapproved material, may informally pressure employees to make the desired changes." *Ibid.* The court reasoned that "if publication without

the change could be punished after the fact under *Pickering*, then presumably the employee is not made worse off by having advance notice of the government's view." *Id.* at 23a-24a. "If, on the other hand, publication of the unaltered material cannot constitutionally be punished," the court continued, "then the employee has nothing to fear by going ahead." *Id.* at 24a.

The court also concluded that Section 628.2's review "process permits the government to take corrective action before the unauthorized disclosure of classified information occurs." Pet. App. 25a. Even though Section 628.2 applies to personnel who do not have direct access to classified information, the court pointed to the government's evidence that "even employees without such direct access may inadvertently, and even unknowingly, come into contact with classified information." *Ibid.* In addition, the court found that if an employee intends to publish statements that could damage the foreign relations of the United States, prepublication review "enables the government to contact foreign powers and assuage their concerns about U.S. policy." *Id.* at 26a.

The court further concluded that the "advance nature of the review is at a minimum 'reasonably necessary' to protect the government's interests." Pet. App. 26a (quoting *NTEU*, 513 U.S. at 574)). The court reasoned that, "[a]s to classified information, advance review is plainly essential to preventing dissemination of the information." *Id.* at 26a-27a. And, the court explained that "as to other sensitive material, only review before publication enables the government to take preemptive rather than merely reactive steps in response." *Id.* at 27a.

Finally, the court assessed the burdens on employee speech. "As to the duration of the review process," the court observed, petitioner "makes no claim of long delays." Pet. App. 27a. Nor did the court "think those who have secured formal roles explicating and advancing U.S. Foreign policy—or even those who have found employment in an agency charged with that role—have a transcendent interest in instant publication of statements made on agency-related matters." *Ibid.*

Judge Wald dissented. Pet. App. 29a-60a. In her view, the only reasonable construction of Section 628.2 "is that if the employee publishes material of 'official concern' without prior agency approval she has violated agency regulations and can expect to be punished." *Id.* at 34a. Judge Wald also expressed the view that even under the majority's interpretation of Section 628.2, the regulation fails the balancing test employed by the majority, because the agency "has not convincingly demonstrated that it needs to conduct such review in the case of all its employees," Pet. App. 48a, and the regulation "chills potential speech before it happens." *Id.* at 55a (emphasis omitted) (quoting *NTEU*, 513 U.S. at 468)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioner argues (Pet. 16-18) that the Court should grant review to consider the proper interpretation of Section 628.2. We have been informed, however, that the Department of State, USIA, and AID have begun the process of redrafting the rules set

forth in Section 628.2, and that the contemplated revisions will address the ambiguities identified by the court of appeals.[2] Especially in these circumstances, the correctness of the court of appeals' interpretation of Section 628.2 does not present an issue of substantial importance for the Court to consider. As currently envisioned, the new rules would establish a rebuttable presumption that speeches and writings on matters of official concern by employees are delivered or published in the employee's private capacity when accompanied by a disclaimer that the views expressed are the employee's own view.[3] For speech understood to be delivered or published in a private capacity, the rules would require prepublication review only for the purpose of deleting information protected from disclosure by statute, such as classified information and information protected under the Privacy Act, 5 U.S.C. 552a, and the Freedom of Information Act, 5 U.S.C. 552. Thus, because the new rules would make clear that they do not operate to ban or punish speech

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[2] Because Section 628.2 governs agency personnel, both the agencies may amend the rule without notice and comment rulemaking procedures. See 5 U.S.C. 553(a)(2). The agencies expect to issue the new rules by August, 1997.

[3] Under the approach now under consideration, for senior employees of a specified rank, the presumption could be overcome only by a designated senior official's written determination establishing that, notwithstanding the disclaimer, the employee's views would be likely to be attributed to the agency and demonstrably to impair the foreign affairs mission of the agency. For lower ranking employees, the presumption could be overcome only by a written determination to the same effect by the head of the agency or other agency principal. Where the presumption is overcome, an employee's speech would be considered to be speech delivered in the employee's official capacity, and would be regulated as such.

(other than that revealing information protected by statute) if it is clearly understood to be delivered in an employee's private capacity, the interpretation of Section 628.2 is not an issue warranting this Court's review.

In any event, petitioner's arguments regarding the interpretation of Section 628.2 lack merit. Contrary to petitioner's suggestion (Pet. 16-18), Section 628.2 does not prohibit employee speech. Narrowly construed, Section 628.2 allows the government to examine writings by an employee relating to matters of official concern prior to publication, and to make suggestions concerning the proposed writings that the employee is free to accept or reject. The court of appeals correctly declined to interpret Section 628.2 in a manner that has not been advanced by the agency administering the rule, and that would "raise serious constitutional issues" if it were adopted. Pet. App. 12a; see also *id.* at 13a (citing *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916), and *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)).

As the court of appeals observed, VOA's practice comports with the court of appeals' interpretation of Section 628.2. According to an affidavit submitted by the acting director of the VOA office that administers Section 628.2 for the VOA, "there was at that time no instance in the institutional memory of the office (stretching back about five years) in which a VOA employee had refused to make changes requested by the agency." Pet. App. 18a. Indeed, the application of Section 628.2 to petitioner in this case is consistent with the court of appeals' procedural interpretation of the rule. A written copy of petitioner's admonishment "chastises her only for having published her article 'without proper clearance *procedures*'" and

"makes no mention of substantive violations." *Ibid.* (emphasis added by the court).

2. No other court of appeals has addressed the validity of Section 628.2. Contrary to petitioner's assertion (Pet. 15-16), the decision below does not conflict with the Fourth Circuit's decision in *United States* v. *Marchetti*, 466 F.2d 1309, cert. denied, 409 U.S. 1063 (1972). The Fourth Circuit in *Marchetti* upheld the constitutionality of a secrecy agreement that required employees, prior to publication, to submit material to the Central Intelligence Agency (CIA) for the agency's approval. 466 F.2d at 1317-1318. In so holding, the Fourth Circuit stated that "with respect to information which is unclassified or officially disclosed," the First Amendment "limits the extent to which the United States * * * may impose secrecy requirements upon its employees and enforce them with a system of prior censorship." *Id.* at 1313. That statement was dictum, however, and it is not in any event in conflict with the decision below, which involves only a review process, not prior censorship. As the court of appeals observed, the speech restrictions in *Marchetti* "clearly intended substantive application," and thus the courts' "dictum * * * is not pertinent" to this case. Pet. App. 25a n.4.

3. a. The court of appeals correctly concluded that Section 628.2 prepublication review requirement "passes muster." Pet. App. 23a. Regulations that impinge on speech of government employees are judged under a First Amendment test that requires a court to weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Picker-*

ing, 391 U.S. at 568. Where a generally applicable rule is at issue, the "expression's 'necessary impact on the actual operation' of the Government" must outweigh the interests of both employees and potential audiences "in a broad range of present and future expression." *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).[4]

That balancing test permits the government to "impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *NTEU*, 115 S.Ct. at 1012. See *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (upholding secrecy agreement requiring prepublication review to screen for secret information relating to national security); *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act's prohibition on partisan political activity by federal employees).

The use of such a balancing test reflects the recognition that the government, when it acts as employer, "has far broader powers than does the government as sovereign," because of "the nature of the government's mission as employer." *Waters* v. *Churchill*, 511 U.S. 661, 671, 674 (1994). "In striking that balance, * * * '[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it

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[4] Although petitioner relies (Pet. 12-14, 19-20) on decisions of this Court that did not involve expression by public employees, the dissenting opinion below did not quarrel with the majority's application of "the test of *Pickering* and *NTEU*" to determine the validity of Section 628.2. Pet. App. 23a; see *id.* at 43a (applying "[t]he *Pickering/NTEU* balancing test").

acts as employer.'" *Board Of County Comm'rs* v. *Umbehr*, 116 S.Ct. 2342, 2348 (1996) (quoting *Waters*, 511 U.S. at 675). Thus, the Court has consistently given "substantial deference * * * to the government's reasonable view of its legitimate interests." *Umbehr*, 116 S. Ct. at 2348-2349.

b. Balancing the nature of the restriction imposed by the review process under Section 628.2 and the significant governmental interest that supports that process, Section 628.2 is constitutional.

i. The court of appeals correctly determined that Section 628.2's review process imposes only limited restrictions on employees' rights of expression. The rule requires that a VOA employee, before writing on a matter reflecting the business of her agency, first allow her agency to comment about the proposed speech to the extent it is "inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations." 3 FAM § 628.2(c). The regulation does not authorize the agency to forbid publication.

Petitioner is incorrect that the prepublication review process constitutes a "wholesale deterrent to a broad category of expression by a vast number of potential speakers." Pet. 22. The prepublication review procedures apply to only that speech "which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States." 3 FAM § 628.2(a). Compare *NTEU*, 115 S.Ct. at 1012 ("With few exceptions, the content of [public employees'] messages [subject to honorarium ban] has nothing to do with their jobs and does not even arguably have any

adverse impact on the efficiency of the offices in which they work.").

Because the rule allows the agency only to comment upon, but not to censor, employee speech, "[t]he primary burden on employees from the regulation is simply the delay associated with submitting to the review process prior to publication." Pet. App. 23a. Petitioner does not assert, however, that the review entailed under Section 628.2 is lengthy. *Ibid.* Moreover, the new rules being drafted by the Department of State and USIA to supersede Section 628.2 are expected to provide a 30-day time period in which prepublication review must be completed.

ii. The court of appeals also was correct in determining that Section 628.2 is supported by several significant interests. The process of prepublication review guards against the improper disclosure of classified information. That interest is "vital" and "compelling" (*Snepp*, 444 U.S. at 509 n.3) and is present whether the disclosure is intentional or inadvertent. *Id.* at 512 (when an employee "relies on his own judgment about what information is detrimental, he may reveal information that the [agency]—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful"). The prepublication review procedures also permits VOA to maintain its mission as an apolitical "source of news." Foreign Relations Authorization Act, Fiscal Year 1977, Pub. L. No. 94-350, § 206, 90 Stat. 832. VOA must "present the policies of the United States," 90 Stat. 832, and an employee's freelance or misdirected speech on matters related to the agency's policies or to the foreign relations of the United States could threaten VOA's basic mission to broadcast "accurate, objective and

comprehensive" news throughout the world. 90 Stat. 831. This Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673. That deference is particularly warranted in this case, because government officials need sufficient latitude to operate effectively in the arena of foreign affairs. See *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-319 (1936); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Petitioner's article illustrates the danger that prepublication review is designed to prevent. Subtitled as a report by "an insider," the article could be read to represent the views of the United States. Previewing material of official concern enables the agency to respond appropriately, including "contact[ing] foreign powers and assuag[ing] their concerns." Pet. App. 26a.

Petitioner also argues (Pet. 23) that Section 628.2 is not "tailored" to the interest of preventing dissemination of classified information. As the court of appeals determined, however, advance review is appropriate because publication of classified information generally cannot be cured after the fact. Pet. App. 26a. Similarly, "as to other sensitive material," the court of appeals correctly found that "only review before publication enables the government to take preemptive rather than merely reactive steps in response." *Id.* at 26a-27a. Moreover, "because of the risk of unintended leakage of classified or other sensitive information" (*id.* at 28a), Section 628.2's application to all VOA employees is reasonable. The court of appeals observed that the review process

"may be particularly important" to employees without direct access to classified information or sensitive foreign policy information, because "unintended recipients of information are especially likely to have no idea that their material may harbor damaging disclosures." *Ibid.*[5] Given the government's interests and the absence of any "claim of long delays" (Pet. App. 27a), Section 628.2's review process restricts no more speech than is reasonably necessary to achieve the government's interests. For that reason—and because there is no circuit conflict on the question presented and the responsible agencies are in the process of revising the relevant provisions of the FAM—review by the Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The disclaimer requirement under 3 FAM 628.5-3 obviously does not in itself prevent inadvertent disclosure of sensitive or classified information, and petitioner does not suggest otherwise. Thus, only advance review adequately safeguards against that risk.